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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 499

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY AND RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN, PETITIONER

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ AND SOUTHERN RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, CHAIRMAN OF ARBITRATION BOARD 282 AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RALPH T. SEWARD AND UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 499 (Pet. App. 1a–2a) is not yet reported. The opinion

of the district court in No. 499 is reported at 252 F. Supp. 961.

The opinion of the court of appeals in No. 500 (Pet. App. 1a–6a) is not yet reported. The opinion of the district court in No. 500 is reported at 248 F. Supp. 1008.

JURISDICTION

The opinion and judgment of the court of appeals in both No. 499 and No. 500 were entered on May 19, 1967. The petitions for writs of certiorari were filed on August 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question presented by these two petitions is whether petitioner is barred, under principles of *res judicata,* from relitigating the question whether the special boards of adjustment, created under the Award of Arbitration Board 282, were required to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act, where that issue could have been raised in earlier litigation between the same parties in which the validity of the Award of Arbitration Board 282 was sustained.

A subsidiary question presented by the petition in No. 500 is whether petitioner may complain of the procedures employed by special boards of adjustment in proceedings in which petitioner refused to participate and, hence, never objected to the procedures employed.

STATEMENT

The present litigation arises from a lengthy dispute between the railroads and their unions regarding the

abolition of firemen's jobs and the composition of crews in road and yard service. In August 1963, the inability of the parties to compose their differences led to the passage by Congress of Public Law 88-108 (77 Stat. 132); which provided for the establishment of an arbitration board. That board, known as Arbitration Board 282, rendered its award on November 26, 1963, to be effective on January 25, 1964.

Section III of the Award dealt with the composition of road and yard crews. Board 282 found that a national prescription of crew size would be unrealistic,[1] and its Award therefore provided for disposition of the "crew consist" issue on a local basis in accordance with procedures and guidelines specified in the Award. The Award provided that, if the union and railroad could not reach agreement upon proposed changes in existing crew-consist rules, the dispute was to be referred to a local special board of adjustment. One member of the special board was to be named by each of the two disputants, and a third member was to be chosen by the two partisan members or, if they could not agree, by the National Mediation Board. The decision of the majority of each special board was to be binding on both parties. The Award set forth in detail guidelines which special boards were to follow in making their binding dispositions. They were instructed to take account of such factors as the requirements of safety, the avoidance of unreasonable burdens on crew members, changes in operating conditions, the physical characteristics of

[1] See Opinion of the Neutral Members, 41 Lab. Arb. 680, 694 (1964).

the line to be traversed, and the number of highway crossings to be protected.

Although Section 4 of Public Law 88–108 provided that the proceedings before the statutory arbitration board (*i.e,* Board 282) were to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act (45 U.S.C. 157, 158) "to the extent not inconsistent" with Public Law 88–108, the Award of Board 282 did not impose a similar requirement on the special boards of adjustment. Indeed, in a number of respects the Award of Board 282 established rules of procedure for the special boards quite different from those specified in Sections 7 and 8 of the Railway Labor Act. For example, Section 7, Third(e) of the Act, provides that the National Mediation Board shall bear the expenses of neutral arbitrators; Section III–B(3) of the Award, on the other hand, provided that "the costs and expenses of the neutral member [of each special board] and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement" (J.A. No. 500,[2] p. 7). In general, Board 282 determined that resolution of crew-consist disputes by special boards would best be served by more informal and expeditious procedures than those provided by the Railway Labor Act.[3]

[2] "J.A. No. 500" refers to the Joint Appendix filed in the court of appeals in No. 500. "J.A. No. 499" refers to the Joint Appendix filed in the court of appeals in No. 499.

[3] In response to a question presented by petitioner, Board 282 pointed out (J.A. No. 500, pp. 59–62):

> * * * The procedures for the establishment and conduct of statutory arbitration boards under Section 7 of the Act were too cumbersome and formal for our purposes;

In an action brought by petitioner and several other unions, both the constitutionality of Public Law 88-108 and the validity of the Award of Board 282 were sustained. *Brotherhood of Loc. F. & E. v. Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918. As the district court opinion in that case discloses, the unions attacked the validity of the Award on numerous grounds; they did not, however, contest the failure of the Award to require the special boards of adjustment to conduct their proceedings in conformity with Sections 7 and 8 of the Railway Labor Act.

On January 25, 1964, after the district court's decision in *Brotherhood of Loc. F. & E. v. Chicago,*

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moreover, by definition they depend for their establishment upon "agreement of the parties," which was obviously lacking in this case. Accordingly, the Board directed that crew consist disputes be submitted to special boards of adjustment, specially designed for the task, in accordance with those procedural requirements deemed necessary to insure a prompt, equitable, and final disposition of these controversies.

* * * * *

Section 7 First of the Act provides for a board of either three or six persons; our Award stipulates a board of three. Section 7 Third(f) requires that the arbitration board shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified by at least a majority of the board, to the clerk of the federal district court for the district in which the controversy arose, and that certified copies shall also be filed with the National Mediation Board and the Interstate Commerce Commission. Our Award imposes no such requirements.

B. & Q. R. Co., supra, but before the court of appeals had affirmed that decision, several carriers invoked the procedures of the Award by serving petitioner with notices of proposed changes in rules governing crew composition.

With respect to the carriers involved in No. 500—the Missouri Pacific, Texas and Pacific, and Natchez & Southern Railroads—petitioner flatly refused to negotiate over the proposed changes, contending that the carriers' notices had been served prematurely (J.A. No. 500, pp. 72, 83, 92, 101). Thereafter, when special boards of adjustment were convened, petitioner refused to participate in the proceedings before them. These special boards therefore made findings and awards based upon the written evidence and arguments submitted by the carriers.[4]

With regard to the carrier involved in No. 499, petitioner did participate in the special board proceedings, although it objected to the conduct of the hearing

> * * * except and unless proceedings of the Board are handled in accordance with Sections 7 and 8 of the Railway Labor Act; that is, that the Board be in a position to make a transcript of all proceedings and take evidence under oath and mark all exhibits with a number and enter them in evidence. [J.A. No. 499, p. 28.]

[4] Petitioner's assertion (Pet. No. 500, p. 5) that the special boards authorized all changes requested by the carriers is contrary to the record, which shows that several proposals were rejected as not justified under the guidelines set forth in the Award, or as being outside the scope of the Award (see J.A. No. 500, pp. 76–79, 87, 96, 98).

This position was rejected by the special board. However, petitioner's requests that it be furnished a copy of the carrier's written submission and that testimony be taken under oath were granted. At the start of the hearing, each party was told that it could arrange to have a court reporter make a transcript of the proceeding if it so desired. Neither the carrier nor petitioner made such an arrangement (J.A. No. 499, p. 42).

Following the completion of the special board proceedings, petitioner commenced an action to enjoin the carriers in No. 500 from reducing crews in accordance with the special board awards. On June 8, 1964, the district court denied this relief, rejecting, *inter alia,* petitioner's contention that the special boards were required to follow the procedures of Sections 7 and 8 of the Railway Labor Act. 231 F. Supp. 519 (D.D.C.). On June 24, 1965, the court of appeals, however, ruled that "such questions properly come within the purview of [Board 282's] primary jurisdiction," and remanded the case to the district court with instructions to afford the parties an opportunity to seek clarification from Board 282. *Brotherhood of R. Trainmen* v. *Certains Carriers,* 349 F. 2d 207 (C.A.D.C.).

Petitioner then inquired of Board 282 whether special boards of adjustment were required to comply with the procedures set forth in Sections 7 and 8 of the Railway Labor Act.[4] Board 282 replied in the negative (J.A. No. 500, pp. 54–71; J.A. No. 499,

[4] See Question 36 (J.A. No. 500, pp. 66–71) and Question 47 (J.A. No. 499, pp. 77–78).

pp. 77–78). The Board explained that it "was never our intention that the special boards of adjustment * * * would be subject to Sections 7 and 8," that the omission of such procedural requirements from the Award was "deliberate," and that the Award had left no doubt of the Board's intentions in this regard (J.A. No. 500, pp. 59–61).

Petitioner then initiated the present proceedings to impeach the Board's explanatory rulings. The district court sustained the Board's rulings in two decisions. 248 F. Supp. 1008; 252 F. Supp. 961. On May 19, 1967, the court of appeals affirmed both of the district court's decisions on the ground that the petitioner's failure to raise the issue of whether special boards of adjustment were required to conform to requirements of Sections 7 and 8 to the Railway Labor Act, in its previous challenge of the validity of the Award of Board 282,* barred the present attack on the procedures followed by the special boards (Pet. App. No. 499, pp. 1a–4a; Pet. App. No. 500, pp. 1a–6a). In No. 500, the court sustained the rulings of Board 282 and the district court on the additional ground that petitioner could not complain of the procedures followed by special boards in which it deliberately refused to participate (Pet. App. No. 500, pp. 4a–6a).

ARGUMENT

The court below was clearly correct in ruling that its previous decision upholding the validity of the

* *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.*, 225 F. Supp. 11 (D.D.C.), affirmed, 331 F. 2d 1020 (C.A.D.C.), certiorari denied, 377 U.S. 918.

Award of Board 282, *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co., supra,* was *res judicata* as to the question of whether special boards of adjustment were required to follow the procedures set forth in Sections 7 and 8 of the Railway Labor Act. The *res judicata* question, as well as the issue as to the procedures to be followed by special boards, turn on the peculiar circumstances surrounding the Arbitration Award under Public Law 88–108, which Award expired by its own terms in early 1966. Those issues are not likely to recur, no conflict between the circuits is involved, and further review by this Court seems unwarranted.

1. It is well settled that "a judgment for the merits in one suit is res judicata in another, where the parties and the subject matter are the same, not only as respects matter actually presented to sustain or defeat the right asserted but also as to any other available matter which might have been presented." *Midessa Television Co.* v. *Motion Pictures for Television, Inc.*, 290 F. 2d 203 (C.A. 5), certiorari denied, 368 U.S. 827; *Calvin* v. *Calvin,* 214 F. 2d 226 (C.A.D.C.); see also, *Commissioner* v. *Supnen,* 333 U.S. 591, 597; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352.

The present actions fall squarely within that principle. Petitioner clearly could have contested the very issue it raises here when it attacked the validity of the Award of Board 282, for that Award not only did not require the special boards to follow Sections 7 and 8 of the Railway Labor Act, but specified a number of procedures quite different from those specified in that Act. Indeed, in the earlier

action, petitioner did attack, unsuccessfully, one of the procedures (for the sharing of costs of the neutral arbitrator) which clearly was not in conformity with Section 7, albeit the attack was not on that ground. See 225 F. Supp. at 21.[7] It is evident that, were petitioner's contentions accepted here, the Awards itself would be invalid insofar as it failed to require special boards to comply with Sections 7 and 8. Having had full opportunity to litigate the validity of the Award, petitioner may not undercut it, after adjudication, in these collateral proceedings.

The present actions are a particularly undesirable form of piecemeal litigation. The Award of Board 282 called for expeditious local disposition of the crew-consist issue (J.A. No. 500, pp. 6–7). Yet with time of the essence, petitioner waited until the special boards exercised the freedom from what Board 282 deemed the "cumbersome" procedures of Sections 7 and 8 (J.A. No. 500, p. 60) and then sought by the present litigation to undo the work of the special boards, thus precluding the prompt settlement of the issue. In these circumstances, the court of appeals properly held the suits barred by *res judicata*.

2. In No. 500, the court of appeals also correctly ruled that the attack on the procedures employed by the special boards was precluded by petitioner's deliberate refusal to participate in the proceedings. It is settled that a party may not upset an administra-

[7] Petitioner contended that Board 282 "lacked authority to require the parties to bear the expenses of neutral members of the local adjustment boards." Section 7, Third(e) of the Railway Labor Act, 45 U.S.C. 157, Third(e), provides that the National Mediation Board shall bear such expenses.

tive or arbitral determination on grounds not raised before the decision-making body, particularly where the objections are procedural. *E.g., United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 627 (C.A. 3), certiorari denied, 348 U.S. 871; *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589 (C.A. 7).

3. We also note that there is no merit in petitioner's underlying contention that its rights under Public Law 68–108 and the Due Process Clause were violated by the failure of Board 282 to require the special boards to follow the procedures of Sections 7 and 8 of the Railway Labor Act, particularly by providing transcripts of their proceedings. None of the special boards refused to permit petitioner to have a transcript of the proceedings, if it desired. The board in No. 499, before which petitioner appeared, expressly invited either party to make a transcript. Petitioner can hardly complain that its right to "meaningful review" is frustrated by the lack of a transcript which it could have obtained, had it chosen to do so. Surely, in the absence of a showing of indigence, the failure to provide petitioner with a *free* transcript cannot impair any constitutional right. Moreover, it is not generally required that formal records be made in arbitral proceedings. See *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 203–204, n. 4.[8] For

[8] A transcript of oral testimony is not in fact essential to the limited review which may be obtained of the final and binding decision rendered in arbitration. The decision of an arbitrator is not subject to review on the merits; it is at most reviewable to determine whether the arbitrator stayed within the sub-

example, transcripts of oral testimony are not ordinarily made in proceedings before the National Railroad Adjustment Board (See J.A. No. 500, p. 19).

Similarly, the argument that Public Law 88–108 required that the particular procedures of Sections 7 and 8 of the Railway Labor Act be followed by the special boards of adjustment is without merit. The "arbitration" that Public Law 88–108 required to be conducted in accordance with Sections 7 and 8 of the Railway Labor Act was the arbitration by Board 282; that arbitration was, under Section 3 of Public Law 88–108, to "constitute a complete and final disposition" of the issues. The contention by petitioner and other unions in *Brotherhood of Loc. F. & E.* v. *Chicago B. & Q. R. Co., supra,* that the Award of Board 282 was invalid because it did not finally dispose of the issues insofar as it provided for further proceedings before local special boards of adjustment, was explicitly rejected. 225 F. Supp. at 20–21, affirmed, 331 F. 2d 1020. Hence, petitioner's present argument that the special boards of adjustment were required to adhere to the procedures of Sections 7 and 8 because part of the arbitration which Board 282 was required to conduct in accordance with those sections was delegated to the special boards is merely repetitive of the rejected contention that Board 282 failed to complete its statutory assignment. If Congress left Board 282 with the leeway to create the local special boards, as settled in *Brotherhood of Loc. F. & E.* v. *Chicago, B. & Q. R. Co.,*

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mission agreement (or, in these cases, within the Award of Board 282). *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 598.

supra, surely Board 282 also acted within its authority in permitting those special boards to employ procedures flexible enough to accomplish the desired prompt, local disposition of the crew-consist issue.[9]

In all events, given the expiration of Public Law 88–108 in 1964 and of the Award of Board 282 in 1966, in accordance with their respective terms, none of these issues is of such prospective significance as to warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1967.

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[9] Board 282 expressly found that the procedures of Sections 7 and 8 were too formal and cumbersome to accomplish its purposes in establishing the special boards (J.A. in No. 500, p. 60).

U.S. GOVERNMENT PRINTING OFFICE: 1967